

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CANDACE CLARKE,)	
)	
Plaintiff,)	
)	No. CV-06-229-HU
v.)	
)	
MULTNOMAH COUNTY, NANCY)	
WINTERS,)	OPINION & ORDER
)	
Defendants.)	
_____)	

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HUBEL, Magistrate Judge:

Plaintiff Candace Clarke brings this 42 U.S.C. § 1983 action against her former employer, Multnomah County, and her former supervisor Nancy Winters. Plaintiff brings a First Amendment

1 retaliation claim against both the County and Winters, an Oregon
2 statutory whistleblower claim against the County, and a common law
3 wrongful discharge claim against the County.

4 Defendants move for summary judgment against all claims.
5 Plaintiff concedes the wrongful discharge claim, but opposes the
6 motion in all other respects. All parties have consented to entry
7 of final judgment by a Magistrate Judge in accordance with Federal
8 Rule of Civil Procedure 73 and 28 U.S.C. § 636(c). I grant
9 defendants' motion.

10 BACKGROUND

11 Plaintiff was hired by the County on June 28, 2004, as
12 Business Manager in the Mental Health & Addiction Services Division
13 (MHASD), part of the County's Department of Human Services. Nancy
14 Winters was her immediate supervisor, and Al Stickel, Chief
15 Financial Officer of the Human Services Department, supervised her
16 on fiscal matters.

17 Plaintiff's job duties included managing and leading the
18 "fiscal team" and coordinating the business services activities
19 within MHASD, facilitating the fiscal, administrative, and
20 budgetary tasks, synthesizing and directing the processing of
21 information impacting program expenditures and revenues, and
22 ensuring that all internal controls and applicable federal, state,
23 local, and private funding sources, policies, and reporting
24 requirements were maintained.

25 Plaintiff contends that comments she made during her tenure
26 about four different topic areas were the basis for her
27 termination. They are: (1) ITAX, (2) Cascadia Behavioral Health,
28 (3) ITS overpayment, and (4) a projected 9.1% decrease in Medicaid

1 funding.

2 A. ITAX

3 Before plaintiff began working for the County, county citizens
4 passed a measure approving a personal income tax, commonly referred
5 to as the "ITAX." During her employment with the County, in
6 approximately July 2004, county employee Dr. Peter Davidson told
7 plaintiff that MHASD had received funding from the County's ITAX
8 and that the state had also partially restored funding for the same
9 services. Plaintiff believed that it was illegal for the County to
10 keep both the ITAX funds and the partially restored state funding.

11 Plaintiff talked to both Winters and Stickel about her
12 concern. Plaintiff states that Winters acknowledged that the
13 County had an "embarrassment of riches" as a result of receiving
14 the two sources of funds. Plaintiff states that Winters acted
15 impatiently toward her, telling her to "let it go."

16 Stickel apparently informed plaintiff that Patty Pate, then
17 Director of the County's Human Services Department, was aware of
18 the issue and that Pate had talked to the County Chair's office
19 which had instructed the Department of Human Services to return
20 \$500,000 of the ITAX to the County's general fund and to keep the
21 remaining funds. Plaintiff asserts that Stickel did nothing to
22 alleviate her concern that it was wrong and illegal for the County
23 to keep the money from both sources. Plaintiff states that she
24 also spoke to Keith Mitchell, her subordinate, about the ITAX issue
25 and he told her that the County had used the excess money to fund
26 a number of different projects, including "cultural competency," in
27 order to buy support from minority voters.

28 / / /

1 B. Cascadia Behavioral Health

2 The County contracts with Cascadia to provide mental health
3 services. Early on in plaintiff's tenure with the County, Stickel
4 told her that the County was concerned that Cascadia would request
5 funds in addition to what had been contracted. Plaintiff states
6 that Stickel told her she needed to watch Cascadia and make them
7 "toe the line." Exh. 1 to Short Declr. (Pltf's Depo.) at pp. 18-
8 19). Plaintiff asserts that Stickel told her he was still upset
9 about a recent "bail out" payment the County had made to Cascadia
10 some time in December 2003. Many county employees had frequent
11 discussions about Cascadia's request for additional funds.

12 Winters states that although there were criteria in the
13 Cascadia contract which provided for additional payments, county
14 management agreed that when Cascadia requested additional funds,
15 the County would verify the specific need for those funds. Winters
16 Declr. at ¶ 7.

17 In November - December 2004, Cascadia asked for additional
18 funds outside of those contracted for, for its crisis outreach
19 program. Mitchell, at the time a "Financial Specialist Senior" who
20 reported to plaintiff, confirmed that the crisis outreach program
21 had not had an increase from the County in four years. Mitchell
22 Declr. at ¶ 6.

23 In response to the request, plaintiff formed a finance
24 committee consisting of plaintiff, Stickel, Mitchell, and a person
25 named Chris Yager. The finance committee's purpose was to review
26 the request and gather information.

27 The finance committee told Cascadia that the committee was
28 going to recommend that the County not pay Cascadia additional

1 funds. Plaintiff told Winters about the recommendation, and the
2 finance committee reported the recommendation to the entire
3 management team, including Mitchell, Winters, and others.

4 After this report to the management team, Winters convened a
5 smaller group, consisting of herself, plaintiff, Debra Keever
6 (Cascadia's Chief Financial Officer), Leslie Ford (Cascadia's
7 Director), and at least one clinician. This group was formed to
8 obtain a broader view of the situation by including clinical staff
9 in addition to the finance staff that plaintiff had assembled, and
10 ultimately to determine whether to provide Cascadia with additional
11 funds.

12 Cascadia re-stated their case to the new group and either
13 brought in new clinical information, or at least more fully
14 developed the clinical part of their proposal, in support of the
15 request for additional funds. Seth Lyon, a county clinical
16 employee, supported Cascadia's position for additional funds. In
17 the end, the County provided an increase in funding to Cascadia,
18 based on the need for and value of the crisis program. The
19 decision was based on clinical data and a decision that the County
20 could not afford to lose the program and needed to support it
21 completely. Winters Declr. at ¶ 11.

22 During a meeting of this group, Winters asked plaintiff if she
23 had changed her mind about the finance committee's recommendation
24 that Cascadia not be provided with any additional county funds, and
25 plaintiff responded, "no." Plaintiff believed that Winters
26 appeared mad at plaintiff for this response.

27 Plaintiff states that after that meeting, she "squealed" on
28 Winters by going to Stickel. Pltf's Depo. at p. 118. She alleges

1 that Stickel then told Pate, his boss, and they decided to attend
2 Winters's next management meeting. Id. at p. 119. According to
3 plaintiff, Pate and Stickel were going to come and tell Winters,
4 "in front of everybody," that Cascadia was committing fraud. Id.

5 As best as can be gleaned from the summary judgment record,
6 this concern about "fraud" arose out of an email exchange started
7 by Keever on January 24, 2005. Exh. B to Farrell Declr. Keever
8 sent an email to plaintiff, Stickel, Winters, and Lyon regarding
9 Cascadia's financial statements for November and December 2004.
10 Id. At the end of this email, she stated that she had sent the
11 proposed budgets for crisis programs for 2004-05 and asked if they
12 would let her know if there were any questions regarding the
13 budgets and when could Cascadia expect to know if the submitted
14 budgets would be funded. Id.

15 Plaintiff sent an email to Stickel and Winters within thirty
16 minutes of receiving the email from Keever, and said that

17 [r]egarding Debra's question of when Cascadia would be
18 funded, where I left off was that Finance Team
19 recommended no catch-up payments be made to Cascadia. .
20 . . Then on 12/1/04 there was a joint meeting
21 Cascadia laid out their request for increased funding .
22 . . . Now it does sound like there have been clinical
23 discussions that lead Cascadia to understand that they
24 will be receiving a catch-up payment. . . . Could someone
25 please brief me in writing of what Multnomah County's
26 current position is regarding Cascadia catch-up payments?

27 Id.

28 That night, Stickel emailed plaintiff and Winters and said
that the use of the term "catch up payments," implied that there
were some funds that had not been delivered and that some
accelerated payments were needed to bring things into balance. Id.
Stickel did not recall ever having agreed to giving Cascadia "catch

1 up payments" and wondered if this were Keever's terminology? Id.
2 He said he had no idea who "on the program side," gave Cascadia the
3 impression it was eligible for any additional funds. Id.

4 The next morning, Winters emailed plaintiff and Stickel and
5 said that there were no promises "made in that meeting," but by the
6 time the meeting was over "we had come within about 125K difference
7 between what they need and what they are getting from us." Id.
8 She then stated that sometime after that, "we" came up with about
9 80K "we had 'left over' from other money we got from the state, and
10 took out about 80K to put toward the crisis services, once they
11 invoiced us . . . , which we just got and will be paying." Id. She
12 continued that no promises were made, but that 'we' would try to
13 pay them a little more every time we end up with some money to do
14 that with." Id.

15 Plaintiff then responded in an email to Winters and Stickel
16 that she was still bothered by Cascadia's use of the word
17 "accrued," which I presume appeared in the actual financial
18 statements Keever sent because it is not a word used in the text of
19 her email. Plaintiff explained that in accounting "lingo,"
20 "accrued" meant that Cascadia was representing to its auditors and
21 Board that this money is contractually owed by the County. Id.
22 Plaintiff noted in this email that this "was the point of
23 escalation for Patty Pate" who is an accountant because she
24 understood that Cascadia was treating the difference of opinion as
25 a done deal in Cascadia's favor. Id. She stated that "[t]his
26 practice is not GAAP compliant, and in fact, is considered fraud."
27 Id.

28 Winters then responded to plaintiff and Stickel that she "gets

1 your point now." Id. She said that she was fine with however they
2 re-set the boundaries as long as "we can send them money when we
3 can, until we get a more realistic budget number (in the next
4 budget) to pay them some increase for crisis that they haven't had
5 in years." Id.

6 Plaintiff then wrote to Stickel and Winters and said, "[w]ell,
7 Al, we'd better be clear, on letterhead, in this next communication
8 to Cascadia." Id. She noted that "Cascadia must cease and desist
9 using an accrual process regarding this issue with the County."
10 Id. Stickel responded to plaintiff, but not to Winters, and asked
11 that plaintiff draft something that could be taken to Winters and
12 that Winters had to be a signer. Id. He then stated that "I am
13 concerned that she will have a problem with it because she is still
14 trying to spoon feed money to them without insisting on
15 accountability." Id. The last email communication about this in
16 the record is a few days later when plaintiff emailed Stickel that
17 "[w]e have a bigger problem than that. Let's talk." Id.

18 Plaintiff contends that she was treated differently because
19 she brought up concerns about the County's paying Cascadia
20 additional funds. She contends that Winters stopped her meetings
21 with plaintiff, was unfriendly to plaintiff, and did not include
22 plaintiff in the budget process, which began in January 2005.
23 Plaintiff believed Winters no longer trusted her because of her
24 involvement with the finance committee and her recommendation to
25 not provide Cascadia with the additional funds.

26 C. ITS Overpayment

27 In January 2005, Ralph Summers, Medicaid Policy Manager for
28 the Addiction and Mental Health Division of the Department of Human

1 Services for the State of Oregon, told plaintiff that there was a
2 potential overpayment issue regarding the amount the state had paid
3 the County to run the Intensive Treatment Service Program (ITS).
4 Summers told plaintiff that it appeared that the claims payment
5 data did not match the contractual limit on the number of children
6 to be enrolled in the ITS program at any one time. Summers Declr.
7 at ¶¶ 2, 3. Summers told plaintiff that the state did not perceive
8 any intentional misconduct on the part of the County and that it
9 was not initiating a referral to the Medicaid fraud investigation
10 unit. Id. at ¶ 5. His purpose in telling plaintiff was to make
11 her aware of the issue and to ensure she was involved in its
12 resolution. Id. at ¶ 3.

13 Before Summers communicated this information to plaintiff,
14 Ellen Pimental, who worked with Summers, had already contacted Tom
15 Wirshup, a mental health consultant with MHASD, about this
16 potential overpayment issue. Wirshup Declr. at ¶ 2. At a December
17 4, 2004 meeting, Pimental provided Wirshup with data regarding the
18 billing issue. After that meeting, Wirshup gathered additional
19 data to report back to the state. Id. at ¶ 3. He gave that data
20 to plaintiff in January 2005. Id. at ¶ 4.

21 Within a day of talking with Summers, plaintiff reported the
22 information Summers had told her, to Winters. Winters instructed
23 plaintiff to work with Amy Baker, who supervised the ITS program,
24 to review the documentation and negotiate with the state to try and
25 reduce the amount the state claimed it had overpaid. The ITS
26 billing issue was discussed openly at management team meetings.
27 The record suggests that plaintiff and Baker disagreed about the
28 issue to some extent, with Baker proposing that other services be

1 counted toward the ITS program to adjust billings and reduce the
2 overpayment to zero. Plaintiff disagreed with that approach and
3 apparently voiced her disagreement.

4 Plaintiff was successful in reducing the amount the state
5 alleged was improperly billed. The state initially requested
6 approximately \$700,000 in repayment, and plaintiff worked to reduce
7 that amount to approximately \$280,000, which represented an
8 adjustment over the life of the program of 3.2%.

9 D. 9.1% Decrease in Funding

10 In fiscal year 2005, the state provided the County with \$29.5
11 million to fund the Oregon Health Plan (Medicaid). In November or
12 December 2004, at a "Rates and Finance" meeting, plaintiff learned
13 about a projected 9.1% decrease in state funding. Plaintiff
14 believed that the County's fiscal year 2006 budget should reflect
15 the projected 9.1% decrease in Medicaid funding from the state for
16 mental health services. Plaintiff reported the projected decrease
17 to Winters, Stickel, and to managers at management meetings.

18 Plaintiff spoke with Mitchell, who said that the proposed
19 decrease was not reflected in the budget because funding from the
20 state fluctuates and it is difficult to pin down exact numbers
21 early in the budget cycle. Plaintiff told Winters that Mitchell
22 was not reflecting the 9.1% decrease in the budget. Winters
23 believed that Mitchell was right to follow the process he was doing
24 because he had been with the County for a long time and knew what
25 he was doing.

26 Additionally, the County's Central Budget Office prepared a
27 "Budget Preparation Manual for FY 2006," which provided that "[f]or
28 our budget planning purposes, the County will assume that state-

1 funded programs will receive the same amount of state funding that
2 is currently appropriated." Exh. 3 to Short Declr. at p. 4. In
3 fiscal year 2006, the state ultimately provided the County with
4 \$33.5 million in Medicaid funding, an increase in funding of
5 approximately 13.8%.

6 Plaintiff contends that she was treated differently because
7 she insisted that the 9.1% decrease in state revenue be included in
8 the proposed budget. She contends that Winters stopped her
9 meetings with plaintiff, was unfriendly to plaintiff, and did not
10 include plaintiff in the budget process, which began in January
11 2005.

12 Winters states that plaintiff's conduct demonstrated to
13 Stickel and to Winters that plaintiff was not the right fit as the
14 business manager. Winters Declr. at ¶ 13. According to Winters,
15 Stickel was concerned that plaintiff did not have the knowledge
16 base to handle her position. Id. Winters further states that she
17 herself had lost faith that she and plaintiff could work together.
18 Id.

19 Winters also states that she and Stickel decided together to
20 terminate plaintiff's employment for numerous reasons, including
21 her lack of follow-through on projects, her overreaction to issues
22 that were insignificant to management, including a proposed job
23 title change, and her interpersonal skills, such as "bad mouthing"
24 Winters in a staff meeting, embarrassing Winters in a meeting with
25 Cascadia, and an inability to get along with staff. Id. at ¶ 14.
26 Winters states that staff often complained to her, and others in
27 management, that plaintiff was getting nothing done. Id.

28 Plaintiff points out that both of the performance evaluations

1 she received during her employment with the County were positive.
2 The evaluations show that after three months, in early October
3 2004, Winters rated her as exceeding expectations and noted the
4 following attributes: organized, competent, team player, positive
5 attitude, and professional. Exh. E to Farrell Declr. In December
6 2004, at six months, her rating went down to "meets expectations."
7 Exh. F to Farrell Declr.

8 Plaintiff also notes that she received positive feedback on
9 her job performance from county counsel Patrick Henry and Kathy
10 Shumate, the Quality Management Coordinator for Commitment
11 Services.

12 STANDARDS

13 Summary judgment is appropriate if there is no genuine issue
14 of material fact and the moving party is entitled to judgment as a
15 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the
16 initial responsibility of informing the court of the basis of its
17 motion, and identifying those portions of "'pleadings, depositions,
18 answers to interrogatories, and admissions on file, together with
19 the affidavits, if any,' which it believes demonstrate the absence
20 of a genuine issue of material fact." Celotex Corp. v. Catrett,
21 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

22 "If the moving party meets its initial burden of showing 'the
23 absence of a material and triable issue of fact,' 'the burden then
24 moves to the opposing party, who must present significant probative
25 evidence tending to support its claim or defense.'" Intel Corp. v.
26 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)
27 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th
28 Cir. 1987)). The nonmoving party must go beyond the pleadings and

1 designate facts showing an issue for trial. Celotex, 477 U.S. at
2 322-23.

3 The substantive law governing a claim determines whether a
4 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors
5 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as
6 to the existence of a genuine issue of fact must be resolved
7 against the moving party. Matsushita Elec. Indus. Co. v. Zenith
8 Radio, 475 U.S. 574, 587 (1986). The court should view inferences
9 drawn from the facts in the light most favorable to the nonmoving
10 party. T.W. Elec. Serv., 809 F.2d at 630-31.

11 If the factual context makes the nonmoving party's claim as to
12 the existence of a material issue of fact implausible, that party
13 must come forward with more persuasive evidence to support his
14 claim than would otherwise be necessary. Id.; In re Agricultural
15 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);
16 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,
17 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

18 I. Section 1983 Claim against the County

19 There are three ways for a plaintiff to establish municipal
20 liability in a section 1983 claim. Trevino v. Gates, 99 F.3d 911,
21 918 (9th Cir. 1996).

22 First, the plaintiff may prove that a [municipal]
23 employee committed the alleged constitutional violation
24 pursuant to a formal governmental policy or a
25 longstanding practice or custom which constitutes the
26 standard operating procedure of the local governmental
27 entity. Second, the plaintiff may establish that the
28 individual who committed the constitutional tort was an
official with final policy-making authority and that the
challenged action itself thus constituted an act of
official governmental policy. Whether a particular
official has final policy-making authority is a question
of state law. Third, the plaintiff may prove that an
official with final policy-making authority ratified a

1 subordinate's unconstitutional decision or action and the
2 basis for it.

3 Id. (internal quotation omitted).

4 The County contends it is not liable because there is no
5 evidence that any county employee acted pursuant to an
6 unconstitutional custom, policy, or practice affecting the terms of
7 plaintiff's employment. Plaintiff fails to identify any alleged
8 custom, policy, or practice in her Complaint, and notably, fails to
9 even respond to this argument in response to defendants' summary
10 judgment motion. Operating on the assumption that the practice
11 plaintiff puts at issue in the Complaint is one of discharging
12 employees who report alleged illegal and unethical fiduciary
13 practices, defendant argues that plaintiff fails to come forward
14 with evidence that a county employee acted pursuant to "a
15 widespread practice that . . . is so permanent and well settled as
16 to constitute a 'custom or usage' with the force of law." City of
17 St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988) (internal
18 quotation omitted).

19 Plaintiff submits no evidence that the County maintained any
20 policy, much less a "settled policy" of discharging employees who
21 report alleged illegal and unethical fiduciary practices.¹ Her own

22
23 ¹ At oral argument, plaintiff suggested that the challenged
24 custom, policy, or practice is the County's practice of "behaving
25 in a manner" suggestive of fraudulent activity. The problem with
26 this argument is that even if it were true, it is not a custom,
27 policy, or practice that amounts to a constitutional violation.
28 The constitutional violation at issue in the case is one of
terminating an employee in retaliation for the exercise of the
employee's First Amendment rights to free speech. Any other
alleged policy, practice, or custom is simply not relevant to
establishing County liability for this claim.

1 instance of termination is insufficient to meet her obligation to
2 establish liability on a custom, practice, or policy theory. See
3 City of Oklahoma City v. Tuttle, 471 U.S. 808, 823, 24 (1985)
4 (proof of single incident of unconstitutional activity is generally
5 not sufficient to impose municipal liability).

6 Next, the County argues that it is not liable because there is
7 no evidence that an official with final policy-making authority
8 committed the alleged constitutional tort. In her Complaint,
9 plaintiff alleges that the "actions of Defendant Winters
10 represented official policies, practices, customs, and usages of
11 Multnomah County." Compl. at ¶ 16.

12 As noted above, whether a particular official has "final
13 policy-making authority," is a question of state law. In support
14 of its motion, the County submits evidence that the County's
15 charter and county ordinances specify that the County Chair is the
16 final policy-maker for the purposes of employment policies. Exh.
17 4 to Short Declr. at p. 5 (providing that the County Chair is the
18 "chief executive officer and personnel officer of the County"); see
19 also Exh. 5 to Short Declr. (Executive Rule No. 270 "Personnel
20 Rules", adopted 9/9/02 by Diane Linn, County Chair).

21 Plaintiff provides no evidence in support of the assertion in
22 her Complaint that Winters was a final policy-maker for the County
23 for personnel decisions.

24 Finally, the County argues that it is not liable because there
25 is no evidence that a final policy-maker ratified the allegedly
26 unconstitutional conduct of Winters. In her Complaint, plaintiff
27 alleges that the County "was aware of" and "approved" the
28 unconstitutional conduct of Winters. Compl. at ¶ 17.

1 As noted above, municipal liability may rest upon proof of
2 ratification of unconstitutional conduct by an official with final
3 policy-making authority where the policy-maker ratified a
4 subordinate's unconstitutional decision or action and the basis for
5 it. Trevino, 99 F.3d at 918. To hold the County liable under this
6 theory, plaintiff must demonstrate that the County Chair, the final
7 policy-maker for employment policy for the County, approved
8 Winters's alleged retaliatory discharge and the underlying basis
9 for it. Praprotnik, 485 U.S. at 127.

10 Plaintiff fails to submit any evidence in support of her
11 ratification allegations. She fails to respond to any of the
12 County liability arguments, no matter what the theory.

13 Because plaintiff fails to create an issue of fact regarding
14 the County's liability for the First Amendment retaliation claim,
15 I grant the County's motion.

16 II. Section 1983 Claim against Winters

17 To succeed on a First Amendment retaliation claim, plaintiff
18 must show that (1) she engaged in constitutionally protected
19 speech; (2) the employer took adverse action against her; and (3)
20 her speech was a "substantial or motivating" factor in the adverse
21 action. Freitag v. Ayers, 468 F.3d 528, 543 (9th Cir. 2006),
22 petition for cert. filed, 75 U.S.L.W. 3410 (U.S. Feb. 1, 2007) (No.
23 06-1085).

24 A. Constitutionally Protected Speech

25 Generally, the expression of a public employee is protected by
26 the First Amendment if it relates to a matter of public concern and
27 if, under a balancing test established in Pickering v. Board of
28 Education, 391 U.S. 563 (1968), the employee's interest in

1 expression outweighs the employer's interest in regulating the
2 workplace. Rivero v. City & County of San Francisco, 316 F.3d 857,
3 865 (9th Cir. 2002). Whether particular speech qualifies for
4 constitutional protection is a question of law. Wheaton v. Webb-
5 Petett, 931 F.2d 613, 618 (9th Cir. 1991) (citing Connick v. Myers,
6 461 U.S. 138, 148 n.7, 150 n.10)).

7 As the Supreme Court recently explained,

8 Pickering and the cases decided in its wake identify
9 two inquiries to guide interpretation of the
10 constitutional protections accorded to public employee
11 speech. The first requires determining whether the
12 employee spoke as a citizen on a matter of public
13 concern. See id., at 568, 88 S. Ct. 1731. If the answer
14 is no, the employee has no First Amendment cause of
15 action based on his or her employer's reaction to the
16 speech. See Connick, supra, at 147, 103 S. Ct. 1684. If
17 the answer is yes, then the possibility of a First
18 Amendment claim arises. The question becomes whether the
relevant government entity had an adequate justification
for treating the employee differently from any other
member of the general public. See Pickering, 391 U.S.,
at 568, 88 S. Ct. 1731. This consideration reflects the
importance of the relationship between the speaker's
expressions and employment. A government entity has
broader discretion to restrict speech when it acts in its
role as employer, but the restrictions it imposes must be
directed at speech that has some potential to affect the
entity's operations.

19 Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (2006).

20 Most decisions applying the Pickering analysis have focused on
21 the "matter of public concern" portion of the first element, and
22 not the part the Supreme Court describes as "speaking as a
23 citizen." Garcetti makes clear that the status in which the public
24 employee speaks must be addressed separately from and in addition
25 to whether the public employee was addressing a matter of public
26 concern. The Garcetti Court stated that "[s]o long as employees
27 are speaking as citizens about matters of public concern, they must
28 face only those speech restrictions that are necessary for their

1 employers to operate efficiently and effectively." Id. at 1958.

2 Garcetti explained that the controlling factor in making this
3 determination about the status of the public employee while making
4 the statement at issue, is whether the expressions were made
5 pursuant to the employee's duties. Id. at 1959-60. The Court
6 explicitly held that "when public employees make statements
7 pursuant to their official duties, the employees are not speaking
8 as citizens for First Amendment purposes, and the Constitution does
9 not insulate their communications from employer discipline." Id.
10 at 1960.

11 In Garcetti, the plaintiff was an assistant district attorney
12 whose specific assignment was as a "calendar deputy," which gave
13 him certain supervisory responsibilities over other lawyers. A
14 defense attorney contacted the plaintiff about inaccuracies in an
15 affidavit used to obtain a search warrant. After the plaintiff
16 investigated, he relayed his findings to his supervisors and
17 prepared a disposition memorandum explaining his concerns and
18 recommending dismissal of the criminal case in which the affidavit
19 had been presented. A few days later, he submitted a supplemental
20 memorandum after a follow-up telephone call with the warrant
21 affiant. Despite the plaintiff's concerns, the prosecution
22 proceeded. The plaintiff alleged that following these events, he
23 was subjected to a series of retaliatory employment actions.

24 In analyzing the plaintiff's First Amendment retaliation
25 claim, the Court stated:

26 The controlling factor in Ceballos' case is that his
27 expressions were made pursuant to his duties as a
28 calendar deputy. . . . That consideration - the fact that
Ceballos spoke as a prosecutor fulfilling a
responsibility to advise his supervisor about how best to

1 proceed with a pending case - distinguishes Ceballos'
2 case from those in which the First Amendment provides
protection against discipline. . . .

3 Ceballos wrote his disposition memo because that is
4 part of what he, as a calendar deputy, was employed to
do. . . . The significant point is that the memo was
5 written pursuant to Ceballos' official duties.
6 Restricting speech that owes its existence to a public
employee's professional responsibilities does not
infringe any liberties the employee might have enjoyed as
a private citizen. . . .

7
8 Ceballos did not act as a citizen when he went about
conducting his daily professional activities, such as
9 supervising attorneys, investigating charges, and
preparing filings. In the same way he did not speak as
10 a citizen by writing a memo that addressed the proper
disposition of a pending criminal case. When he went to
work and performed the tasks he was paid to perform,
11 Ceballos acted as a government employee. The fact that
his duties sometimes required him to speak or write does
12 not mean his supervisors were prohibited from evaluating
his performance.

13 Id. at 1959.

14
15 The Court made clear that the fact that Ceballos expressed his
views inside his office, rather than publicly, was not dispositive
16 because employees in some cases may receive First Amendment
17 protection for expressions made at work. Id. at 1958. Also, the
18 Court explained that the fact that the memorandum prepared by
19 Ceballos concerned the subject matter of his employment was also
20 nondispositive because the First Amendment protects some
21 expressions related to the speaker's job. Id.

22
23 The Court concluded its discussion by stating that "[p]roper
24 application of our precedents thus leads to the conclusion that the
First Amendment does not prohibit managerial discipline based on an
25 employee's expressions made pursuant to official responsibilities."
26 Id. at 1961. The Court then noted that because the parties in the
27 case did not dispute that Ceballos wrote his memorandum pursuant to
28

1 his employment duties, the Court had "no occasion to articulate a
2 comprehensive framework for defining the scope of an employee's
3 duties in cases where there is room for serious debate." Id.

4 Responding to a point made by Justice Souter in dissent, the
5 majority continued:

6 We reject, however, the suggestion that employers can
7 restrict employees' rights by creating excessively broad
8 job descriptions. . . . The proper inquiry is a practical
9 one. Formal job descriptions often bear little
10 resemblance to the duties an employee actually is
11 expected to perform, and the listing of a given task in
12 an employee's written job description is neither
13 necessary nor sufficient to demonstrate that conducting
14 the task is within the scope of the employee's
15 professional duties for First Amendment purposes.

16 Id. at 1961-62.

17 In the only published Ninth Circuit post-Garcetti case, a
18 female corrections officer brought Title VII claims and a First
19 Amendment retaliation claim against her former employer. Freitag,
20 468 F.3d 528. Of relevance to the First Amendment claim, plaintiff
21 alleged she was retaliated against for the following acts of
22 speech: (1) reporting sexually hostile inmate conduct to agents of
23 the California Department of Corrections, either formally or
24 informally; (2) documenting Pelican Bay State Prison's responses or
25 failures to respond to plaintiff's reports of sexually hostile
26 inmate conduct; (3) informing the Director of the California
27 Department of Corrections, of either the inmates' sexually hostile
28 conduct or of Pelican Bay State Prison's responses or failures to
respond; (4) informing a state senator of sexually hostile conduct
or of the Pelican Bay State Prison's responses or failures to
respond; (5) reporting either the sexually hostile conduct or the
prison's responses or failures to respond to the Office of

1 Inspector General; and (6) cooperating with the investigation
2 conducted by the Office of the Inspector General.

3 The Ninth Circuit concluded that the plaintiff acted as a
4 citizen when she wrote letters to the state senator and when she
5 communicated with the Inspector General regarding her complaints of
6 sexual harassment. 468 F.3d at 545. The court noted that her
7 right to complain both to an elected public official and to an
8 independent state agency is guaranteed to any citizen in a
9 democratic society regardless of his status as public employee.
10 Id. The court stated that the plaintiff did not lose her right to
11 speak as a citizen simply because she initiated the communications
12 while at work or because they concerned the subject matter of her
13 employment. Id.

14 In contrast, the court concluded that the plaintiff's internal
15 reports of inmate sexual misconduct and documentation of the
16 prison's failure to respond were not constitutionally protected
17 speech because she submitted those reports pursuant to her official
18 duties as a correctional officer. Id. at 546. It was unclear to
19 the appellate court whether plaintiff's letter to the Corrections
20 Department Director was protected because the record did not
21 reveal, one way or the other, whether prison guards were expected
22 to air complaints regarding the conditions in their prisons, all
23 the way up to the Director in Sacramento. Id. It remanded that
24 issue to the district court. Id.

25 Against this backdrop of new cases, Winters argues that
26 plaintiff cannot establish that her speech was protected under the
27 law announced in Garcetti because plaintiff was speaking as part of
28 her official job duties.

1 1. Budget for Fiscal Year 2006

2 As detailed above, when plaintiff learned of a projected 9.1%
3 decrease in state funding for fiscal year 2006, she reported that
4 to Winters and others at the County. In deposition, plaintiff
5 stated that she believed it was part of her job to report to the
6 County the proposed reduction in funding from the state. Pltff's
7 Depo. at p. 74. She also admitted that her job duties included
8 budgeting, and that she was required to have expertise in financial
9 discipline. Id. at p. 41, 101. Her written job description also
10 indicated that she was to oversee the budget for her assigned
11 division, and to assist the Chief Financial Officer (CFO) in
12 facilitating the fiscal, administrative, and budgetary tasks of the
13 division. Exh. 2 to Short Declr. at p. 1.

14 2. Cascadia

15 As noted above, plaintiff communicated her recommendation to
16 deny Cascadia's request for additional funding, to Winters and
17 others. Plaintiff's job description included performance of duties
18 of assisting the CFO in facilitating the fiscal, administrative,
19 and budgetary tasks, and synthesizing, analyzing, and directing the
20 processing of essential information that impacts program
21 expenditures and revenues. Id. She was required to assist the CFO
22 in implementing, maintaining, and analyzing many department-wide
23 fiscal projects. Id. She also was charged with overseeing the
24 budget, finance, grants, accounting, payroll, purchasing,
25 contracting, and billings for the division, as well as monitoring
26 budgetary and fiscal activities to meet program objectives, and to
27 assist in negotiations and contractual relationships with agencies,
28 hospitals, provider networks, and practitioners. Id. She was to

1 determine amounts and keep track of contracts, authorize invoices
2 for payment, monitor the MHASD budget, and identify issues and work
3 with the program manager to implement solutions. Id.

4 As she testified, Stickel raised the Cascadia issue with her
5 early on in her tenure, and told her to watch them and make sure
6 they "toe the line." When the actual requests for extra money were
7 made in November and December 2004, plaintiff formed a committee to
8 look into the problem. Clearly, her investigation of the money
9 request, and her recommendation regarding it, were within her
10 specific job duties, as was communicating her recommendation to the
11 CFO (Stickel), and Winters, her immediate supervisor.

12 3. ITS Billing Adjustment

13 Plaintiff believed that working on the Medicaid overpayment
14 problem that Ralph Summers at the state informed her of, was one of
15 her job duties. She testified in deposition that her job duties
16 included understanding Medicaid compliance generally and working to
17 reduce the amount of the overpayments in this instance. Pltff's
18 Depo. at p. 41, 44. She also testified that generally, part of her
19 job was to make sure that money that was going out of the County
20 was going out in the correct way and that a fund that was supposed
21 to pay for a service was going to the right service. Id. at p. 37.
22 She specifically stated that handling an issue "like this," meaning
23 the ITS/Medicaid overpayment, "where the State is saying there's
24 been a problem, there's a mistake, intentional or otherwise," was
25 part of her job assignment. Id.

26 4. ITAX

27 Based on plaintiff's job description as noted in the preceding
28 three sections, and her testimony as quoted or summarized in the

1 preceding paragraphs, it is clear that plaintiff's expression of
2 concern regarding the ITAX and the restoration of certain state
3 funding combining to "double fund" certain programs, was part of
4 plaintiff's job duties as she admittedly was the budget person for
5 her division, had responsibility for tracking funds and ensuring
6 they were both coming in and going out appropriately, and reporting
7 to the CFO. E.g., Pltf's Depo. at p. 37 (plaintiff stating that
8 during her interview for the position, her job was described to
9 include making sure that money that was going out of the County was
10 going out in the correct way and that a fund that was supposed to
11 pay for a service was going to the right service); Exh. 2 to Short
12 Declr. (written job description included task of synthesizing,
13 analyzing, and directing the processing of essential information
14 that impacts program expenditures and revenues; also included task
15 of collaboration with program managers and state staff, as well as
16 the CFO (Stickel) in determining revenues, developing internal
17 allocations, identifying fiscal placement of new funding, and
18 performing expenditure tracking and reconciliation).

19 Based on her testimony and the written job description, no
20 reasonable juror could conclude anything but all of plaintiff's
21 communications regarding the four subject areas, were pursuant to
22 her official job duties. Notably, plaintiff does not even mention
23 Garcetti in her response memorandum. Instead, she focuses her
24 argument on the remaining parts of the test used to determine if
25 the statement is constitutionally protected - was the statement
26 related to an issue of public concern and the Pickering balancing
27 test.

28 Plaintiff does argue that when she complained to Winters or
24 - OPINION & ORDER

1 Stickel to effectuate a change in something she thought was illegal
2 or unethical, she was "doing more than fulfilling her job duties.
3 She was, in fact, speaking out about matters of great public
4 concern." Pltf's Mem. at p. 16. But, that misses the point. The
5 test is not only whether she was speaking on an issue of public
6 concern. Garcetti discusses whether the communication for which
7 the plaintiff is allegedly being retaliated against, was made
8 pursuant to the employee's official job duties, which these were.

9 Finally, plaintiff contends that nowhere in her job
10 description or articulated job duties was she required to monitor
11 individual county employees' adherence to fiduciary laws and
12 regulations and to complain if she felt they were breaching such
13 obligations. This argument raises two problems. First, she
14 describes the duties too narrowly. Adopting plaintiff's position
15 here would mean that if a job description did not include the task
16 of "whistleblowing," any communication which could be considered as
17 whistleblowing could not be done pursuant to one's official job
18 duties. While I believe that Justice Souter has raised a
19 legitimate concern in his dissent about employers writing job
20 descriptions so broadly as to make every communication by a public
21 employee done in the context of an official job duty, plaintiff's
22 description here is an example of the other extreme which is too
23 narrow.

24 Second, plaintiff's communications were not about individual
25 county employees. They were about issues - what was the County
26 going to do about the double funding (ITAX and state restored
27 funding), overpayments for Medicaid, the 9.1% projected decrease in
28 funding, and Cascadia. Plaintiff's characterization of the essence

1 of the communications is inaccurate and is not supported in the
2 record.

3 I grant the motion as to Winters based on Garcetti and the
4 fact that the record shows that plaintiff's communications at issue
5 in the case were all made pursuant to her official job duties.
6 Accordingly, I do not address Winters's alternative argument that
7 plaintiff would have been terminated regardless of her speech in
8 any event.

9 III. ORS Claim Against the County

10 Plaintiff alleges that the County violated Oregon Revised
11 Statute § (O.R.S.) 659A.203 by terminating her in retaliation for
12 her opposition to the County's alleged illegal fiduciary practices.
13 Compl. at ¶¶ 23-27.

14 Although the Complaint does not clearly identify the
15 particular subdivision of the statute that plaintiff alleges was
16 violated, in her memorandum in opposition to defendants' motion,
17 she states that she "repeatedly and clearly spoke up to Winters,
18 Stickel, and others at the County regarding information that she
19 believed to be a violation of federal and/or state laws, as well as
20 rules and/or regulations by the County." Pltf's Mem. at p. 18.
21 Based on this statement, I understand her claim to be brought under
22 O.R.S. 659A.203(1)(b)(A), which makes it an unlawful employment
23 practice for a public employer to "[p]rohibit any employee from
24 disclosing, or take or threaten to take disciplinary action against
25 an employee for the disclosure of any information that the employee
26 reasonably believes is evidence of . . . [a] violation of any
27 federal or state law, rule or regulation by the state, agency or
28 political subdivision[.]"

1 In the absence of controlling Oregon law, Judge Stewart has
2 applied the standards for a Title VII retaliation claim to similar
3 claims under the Oregon Whistleblower Act. I agree with Judge
4 Stewart. Thus, to establish a prima facie case on this claim,
5 plaintiff must show that (1) she engaged in protected activity; (2)
6 she suffered an adverse employment decision; and (3) she suffered
7 the adverse employment decision because she engaged in the
8 protected activity, that is, there is a causal link between her
9 activity and the employment decision. Minter v. Multnomah County,
10 No. CV-01-352-ST, 2002 WL 31496404, at *6 (D. Or. May 10, 2002)
11 (noting that this district applies the Title VII retaliation
12 framework when assessing retaliation claims under the Oregon
13 Whistleblower Act and requiring that plaintiff prove, as a prima
14 facie case, that she was engaging in protected activity, that she
15 suffered an adverse employment decision, and that there was a
16 causal link between her activity and the employment decision),
17 adopted by Judge Haggerty, June 25, 2002.

18 Defendant moves for summary judgment on this claim based on
19 two arguments: (1) plaintiff did not make a "disclosure" as that
20 term is used in the statute; (2) plaintiff had no reasonable belief
21 that the alleged misconduct violated any federal or state law, or
22 rule or regulation. Both of these arguments go to the first prima
23 facie element requiring plaintiff to establish that she engaged in
24 protected conduct.

25 A. Disclosure

26 The only Oregon case to address the definition of the word
27 "disclosure" as used in the statute, is Bjurstrom v. Oregon
28 Lottery, 202 Or. App. 162, 120 P.3d 1235 (2005). There, the court

1 concluded, based on the text of O.R.S. 659A.203 and indicators of
2 legislative intent, the word "disclosures" includes reports of
3 wrongdoing within an agency or department. Id. at 170-71, 120 P.3d
4 at 1240.

5 The Bjurstrom court was not confronted with the precise
6 argument defendants raise here. Defendants contend that while
7 reports of wrongdoing made within the agency potentially may be
8 "disclosures" under the statute, they are not "disclosures" unless
9 they are made to a person who was previously unaware of the
10 information, meaning someone "in a supervisory position, other than
11 the wrongdoer himself." Huffman v. Office of Personnel Mgmt, 263
12 F.3d 1341, 1351 (Fed. Cir. 2001).

13 When Judge Stewart decided Minter in 2002, she noted that no
14 Oregon case had defined "disclosure" under the Oregon Whistleblower
15 Act. Minter, 2002 WL 31496494, at *7 n.3. She noted that because
16 the Oregon Whistleblower Act is very similar to the federal
17 Whistleblower Protection Act of 1989, decisions concerning the
18 federal law are helpful in defining the sufficiency of the
19 disclosure. Id. She then cited Huffman for the proposition that
20 reports of wrongdoing to supervisors are protected if made to a
21 person "'in a supervisory position, other than the wrongdoer
22 himself.'" Id. (quoting Huffman, 263 F.3d at 1351). In Minter, it
23 was undisputed that the plaintiff made a disclosure to a supervisor
24 other than the wrongdoer. Id.

25 In Huffman, the employee had made several "disclosures." The
26 court first discussed the meaning of the term "disclosure" in the
27 context of resolving whether a complaint to a supervisor about the
28 supervisor's own conduct was protected under the federal

1 whistleblower law. The court noted that the term was not
 2 explicitly defined (nor is it in the Oregon statute), and thus,
 3 basic principles of statutory construction required the court to
 4 give the term its ordinarily understood meaning. Huffman, 263 F.3d
 5 at 1349. After consulting a dictionary, the court stated that
 6 disclosure was defined as "'the act or an instance of disclosing:
 7 the act or an instance of opening up to view, knowledge, or
 8 comprehension.'" Id. (quoting Webster's Third New Int'l Dict. 645
 9 (1968)).² After reviewing further definitions from Webster's, the
 10 court stated that the "term 'disclosure' means to reveal something
 11 that was hidden and not known." Id. at 1349-50. Thus, the court
 12 continued, a report to a supervisor of the supervisor's own
 13 wrongdoing, is not making a "disclosure" of misconduct. Id. at
 14 1350. If the misconduct occurred, the wrongdoer necessarily knew
 15 of the conduct already because he or she is the one that engaged in
 16 the misconduct. Id.

17 In contrast, the court concluded that complaints to a
 18 supervisor about other employees' conduct or other matters was a
 19 "disclosure" within the meaning of the statute, and it did not
 20 matter whether the person to whom the matters were reported had
 21 authority to correct the alleged wrongdoing. Id. at 1351.

22 Relying on Huffman, defendants argue that plaintiff made no
 23 disclosures. Defendants contend that none of plaintiff's
 24

25 ² The Oregon case, Bjurstrom, cited to a different edition
 26 of Webster's and stated that "[i]n common usage, the term
 27 'disclose' may be understood to mean, in a general sense, 'to
 28 make known,' or to 'open up to general knowledge.'" Bjurstrom,
 202 Or. App. at 169, 120 P.3d at 1239 (quoting Webster's Third
 New Int'l Dict. 645 (unabridged ed 2002)).

1 communications disclosed unknown information to county employees.
2 As to the Medicaid overpayments, defendants note that before
3 Summers told plaintiff about it and before plaintiff communicated
4 the information she received from Summers, to Winters, Pimental had
5 already been working with Wirshup on the issue and thus,
6 plaintiff's communication to Winters did not reveal something that
7 was hidden and not known.

8 As to the projected 9.1% decrease in state funding, plaintiff
9 learned about the issue at a "Rates & Finance" meeting and then
10 reported it to Winters. Though plaintiff was the first one to
11 report it to Winters, defendants note that the proposed decrease
12 was already known within the County. The communication between
13 plaintiff and Winters did not, therefore, reveal anything
14 previously unknown.

15 As to the Cascadia finance issues, defendants note that the
16 entire department knew about Cascadia's request for additional
17 funds and the billing problems. Defendants note that this was a
18 problem identified before plaintiff was hired and thus, any
19 communications she made about Cascadia's request for additional
20 funds was not a disclosure of something previously unknown.

21 Finally, as to the ITAX issue, plaintiff testified in
22 deposition that there were probably very few people in the County
23 who were unaware that the ITAX had passed and that it was widely
24 known that money had been partially restored from the state. Thus,
25 defendants argue, she was not disclosing anything that was not
26 already well known. More importantly, if plaintiff argues she
27 "disclosed" the failure to return funds, the decision by the County
28 Chair to transfer \$500,000 to the general fund was known by the

1 Chair, Stickel, and Pate, and thus any communication regarding that
2 decision was not disclosing anything that was not already known.

3 Plaintiff argues that "the record is replete with evidence
4 which demonstrates that Clarke did initially disclose several
5 pieces of information which she believed to be improper fiduciary
6 activities on the part of the County to Winters and Stickel."
7 Pltf's Mem. at p. 18. At oral argument, plaintiff identified
8 testimony appearing at pages 119, 122, 125, 126, and 134 of her
9 deposition as the evidence she relied on.

10 I have carefully reviewed these pages, as well as the other
11 evidence in summary judgment record, and find no basis for
12 plaintiff's position that she made a disclosure within the meaning
13 of the statute. First, the referenced pages of her deposition
14 concern only Cascadia, and none of the other subject areas.
15 Second, the referenced pages show that the thrust of plaintiff's
16 communication was that Cascadia was committing fraud by listing
17 funds as having been accrued when they were not. Finally, there is
18 one reference to plaintiff having a concern that paying Cascadia
19 additional money from a certain fund might constitute fraud on the
20 County's part. Pltf's Depo. at p. 134. However, there is no
21 evidence that this was new information she provided to Winters,
22 Stickel, or anyone else at the County.

23 Moreover, Huffman teaches that revealing the illegality is not
24 enough to make a communication a disclosure. The court explained:

25 To be sure, there may be situations where a government
26 employee reports to the wrongdoer that the conduct of the
27 wrongdoer is unlawful or improper, and the wrongdoer,
28 though aware of the conduct, was unaware that it was
unlawful or improper. Nonetheless, the report would not
be a protected disclosure. It is clear from the statute,
. . . , that the disclosure must pertain to the

1 underlying conduct, rather than to the asserted fact of
2 its unlawfulness or impropriety, in order for the
disclosure to be protected by the WPA.

3 Huffman, 263 F.3d at 1350 n.2.

4 Defendant has the better argument. Although Huffman is not
5 binding, it is the more persuasive authority on the precise issue
6 presented by the facts in this case. There is some distinction
7 between this case and Huffman, but not a material one. The
8 plaintiff in Huffman made some disclosures to his supervisor about
9 that supervisor's alleged inappropriate conduct or mismanagement.

10 Here, plaintiff made communications to Winters, Stickel, and
11 others that did not always directly challenge their conduct. But,
12 the reason the disclosures in Huffman were not actionable was
13 because by reporting bad conduct to the bad actor, the employee did
14 not reveal anything new and thus, did not make a "disclosure" as
15 the court had defined the word for purposes of the statute.
16 Applying that concept here, any of the communications for which
17 plaintiff says she was retaliated against related to topics or
18 issues already known to either the persons she reported to, or at
19 least to other supervisory persons within the County. Thus, as in
20 Huffman, plaintiff did not disclose any information not previously
21 known.

22 I agree with defendants that plaintiff made no disclosures
23 within the meaning of the statute. Thus, I decline to address
24 defendant's alternative argument that even if she had made a
25 disclosure, she lacked a reasonable belief that the conduct she
26 disclosed was a violation of law, regulation, or rule. I grant
27 summary judgment to the County on the state statutory whistleblower
28 claim.

CONCLUSION

Defendants' motion for summary judgment (#17) is granted.

IT IS SO ORDERED.

Dated this 23rd day of March, 2007.

Dennis James Hubel
United States Magistrate Judge